Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-267

DAVID H. BARAL,
Petitioner,

v.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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IN THE

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OCTOBER TERM, 1973

No.

DAVID H. BARAL,

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THE UNITED STATES,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

ORDERS BELOW

The orders of the Court of Claims are appended hereto. The order of December 13, 1972, granting the Government's Motion for Summary Judgment, is reported at 200 Ct. Cl. 741, and is set forth in the appendix, *infra*, pp. A.4-A.5. The order of May 11, 1973, denying Plaintiff's Motion for Reconsideration, is set forth in the appendix, *infra*, pp. A.5-A.6.

JURISDICTION

Jurisdiction of this Court rests upon 28 U.S.C. 1255.

This Petition for a Writ of Certiorari is prayed for on grounds that the Court of Claims (1) has indirectly decided an important question of Federal law which has not been, but should be, settled by this Court; (2) has indirectly decided a Federal question in a way in conflict with applicable decisions of this Court; and (3) has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

On November 29, 1971 Petitioner filed a *pro se* petition in the United States Court of Claims for review of an adverse ruling by the Board of Appeals and Review of the Civil Service Commission on his claim pursuant to 5 U.S.C. 5596, The Back Pay Act. The Government responded by filing a Motion for Summary Judgment on March 13, 1972. Following the filing of briefs (a *pro se* brief by the Plaintiff) and a motion by the Plaintiff that oral argument be allowed, the Court granted the Motion for Summary Judgment and denied the Motion for Oral Argument on December 13, 1972. Petitioner timely filed a Motion for Reconsideration which was denied on May 11, 1973.

QUESTIONS PRESENTED

1. DO THE LLOYD-LAFOLLETTE ACT, 5 U.S.C. 7501, AND THE REGULATIONS ISSUED THEREUNDER, SATISFY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT?

2. **IS EMPLOYMENT WITH THE FEDERAL GOVERNMENT A SUFFICIENT "PROPERTY" INTEREST TO COME WITHIN THE PROTECTION OF THE DUE PROCESS GUARANTEE?**

3. **DOES THE CONCEPT OF DUE PROCESS AS RECENTLY INTERPRETED REQUIRE AN EVIDENTIARY HEARING PRIOR TO TERMINATION?**

4. **IS THE ADMINISTRATIVE ACTION CLOUDED BY EVIDENCE OF BAD FAITH AND PROCEDURAL FLAWS?**

5. **DID THE COURT OF CLAIMS ERRONEOUSLY GRANT THE GOVERNMENTS MOTION FOR SUMMARY JUDGMENT?**

STATUTES

The statutes, 5 U.S.C. 5596, 5 U.S.C. 7501 and 28 U.S.C. 1255, are set forth in the appendix, *infra*, pp. A.1-A.3.

STATEMENT

At the time of Petitioner's discharge from the Federal Aviation Administration on January 28, 1966, he was an Information Systems Analyst, GS-13, in Washington, D.C. Petitioner had held this position since approximately May, 1963 and had been a government employee for more than 24 years.

Petitioner was notified of the proposed adverse action in a letter dated November 22, 1965. Having been advised also of his right to an oral and/or written reply, he submitted a written reply with exhibits on December 29,

1965. On January 21, 1966, Petitioner was informed that it was decided that his removal was warranted and would become effective January 28, 1966. Petitioner was informed of his appeal rights.

The decision to remove was made by the same person who issued the letter of charges. Petitioner orally notified the deciding official that the decision would be appealed, and requested that no adverse action be taken pending the outcome of the appeal. The request was denied.

In a letter dated January 28, 1966, Petitioner filed an appeal with the Federal Aviation Administration. An agency hearing was held on March 21, 1966. On June 13, 1966, the agency hearing officer issued findings of fact and recommendations sustaining the removal. In a letter dated July 5, 1966, the agency issued its final decision to sustain the removal action.

The Petitioner filed an appeal to the Civil Service Commission in a letter dated July 14, 1966. Petitioner proceeded through discovery and other actions until October 27, 1967, when the Appeals Examining Office of the Commission advised him that the Commission was ready to proceed. A hearing was held before the Commission during the period January 9, 1968 to April 22, 1968.

The Appeals Examining Office recommended on October 18, 1968, that the agency action be affirmed.

Petitioner then appealed to the Board of Appeals and Review in a letter dated October 31, 1968. The BAR accepted the appeal and notified Petitioner thereof on November 6, 1968. On December 23, 1968, Petitioner submitted additional material in support of the appeal. After

reviewing all of the record, the BAR concluded that the separation was warranted and effected for such cause as to promote the efficiency of the service; on April 23, 1969, the decision of the Appeals Examining Office was affirmed.

Petitioner filed a petition *pro se* in the Court of Claims on November 29, 1971 being unable to obtain counsel to represent him. Plaintiff had been represented by counsel in the administrative proceeding.

The Government responded by filing a Motion for Summary Judgment which was granted December 13, 1972. Petitioner filed a Motion for Reconsideration which was denied on May 11, 1973.

ARGUMENT

I. THE LLOYD-LAFOLLETTE ACT, 5 U.S.C. 7501, AND THE REGULATIONS ISSUED THEREUNDER DO NOT SATISFY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

Mr. Baral's employment with the Federal Government was terminated pursuant to the Lloyd-Lafollette Act, 5 U.S.C. 7501, *et seq.* and prior to termination he was not provided with the minimum requirements of due process, *i.e.*, an opportunity to be heard in person and present witnesses and documentary evidence, confrontation and cross examination of witnesses, and a decision by a neutral hearing body.

Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886 (1961), cited as authority for the government's right to summarily dismiss an employee, has been narrowly confined by more recent Supreme Court cases. In *Boddie*

v. Connecticut, 401 U.S. 371 (1971), this Court recognized that *Cafeteria Workers* was an example of an "extraordinary situation where some valid government interest . . . [was] at stake that/[justified] postponing the hearing until after the event." Also see *Goldberg v. Kelly*, 397 U.S. 254 (1970).

On October 30, 1972, a three-judge court ruled "the clear implication . . . that absent such a specialized interest, a prior hearing must be afforded before governmental employees may be discharged." *Kennedy v. Sanchez*, 349 F. Supp. 863 (1972), appeal docketed February 12, 1973, *Phillips v. Kennedy*, 41 U.S.L.W. 3450, probable jurisdiction noted April 2, 1973, 41 U.S.L.W. 3527. This same issue has arisen in other cases which are either now before this Court or on appeal from District Court rulings. See *New York State Civil Service Commission v. Snead*, 41 U.S.L.W. 3649 (Case #72-1617); *Department of Social Services of New York City v. Snead*, 42 U.S.L.W. 3002 (Case #72-1691); *Shelton v. Equal Employment Opportunity Commission*, 42 U.S.L.W. 3063 (Case #73-90); and *Davis v. Vandiver*, decided January 12, 1973 (Civil Action #15632, N.D., Ga.), appeal pending (C.A. 5, #73-1481). The rulings on this crucial issue are in conflict with one another making it mandatory that this Court resolve the Constitutional question involved.

2. EMPLOYMENT WITH THE FEDERAL GOVERNMENT IS A SUFFICIENT "PROPERTY" INTEREST TO COME WITHIN THE PROTECTION OF THE DUE PROCESS GUARANTEE.

While there is case law which holds that employment is not property, these decisions have been narrowed or

modified by more recent holdings. *Bailey v. Richardson*, 182 F.2d 46 (CADC 1955), aff'd 341 U.S. 918, by an evenly divided Court with Justice Clark abstaining, recognized the executive's authority to remove any Federal employees whose loyalty he doubts. Mr. Baral's loyalty is not in question in the present case and more recent Supreme Court cases have narrowed the broad fiat of the *Bailey* case.

Mr. Baral's case must be read in light of *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sinderman*, 408 U.S. 593 (1972), both of which concerned teacher contracts and contained language indicating what employment situations were arguably within due process protections.

In *Roth* this Court held that a nontenured State teacher lacked a sufficient "property" interest to fall within the protections of due process under the Fourteenth Amendment, yet recognized certain employment situations where interests in continued employment were safeguarded by due process. In *Perry v. Sinderman, supra*, this Court reiterated that not all employees have sufficient property interest in their jobs to come within due process protection. Yet both cases recognize a flexible concept of property interests protectable under due process guarantees. The Court rejected limiting the category to a "few rigid technical forms" in favor of a broad range of interests . . . secured by 'existing rules and understandings.'"

> "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." *Roth* and *Perry, supra.*

Since Mr. Baral is in the competitive service and could be removed or suspended without pay "only for such cause as will promote the efficiency of the Service," 5 U.S.C. 7501(a), his interest in and explicit understanding of continued employment were within the protection afforded by due process. In *Kennedy v. Sanchez, supra,* the three-judge panel has held a government employee's interest in continued employment to be within the property interests subject to due process guarantees. See also *Ricucci v. United States,* 425 F.2d 1252, 1256-57, 192 Ct. Cl. 1 (1970) (Skelton, J., concurring).

3. THE CONCEPT OF DUE PROCESS AS RECENTLY INTERPRETED REQUIRES AN EVIDENTIARY HEARING PRIOR TO TERMINATION.

The minimum requirements of due process have not been met in the instant case. In *Morrissey v. Brewer,* 408 U.S. 471, (1972) and *Goldberg v. Kelly, supra,* this Court has recognized that the elementary requirements of due process include an opportunity to be heard in person and to present witnesses and documentary evidence, confrontation and cross examination of those witnesses, and a decision by a neutral and detached hearing body. In *Fuentes v. Shevin,* 407 U.S. 67 (1972), the Court recognized the importance of a hearing held at a "meaningful time." For notice and hearing to serve their full purpose, they "must be granted at a time when the deprivation can still be prevented." In *Boddie v. Connecticut, supra,* the Court acknowledged the "root requirement" of due process that an individual be given a hearing before being denied any significant property interest.

Here, Mr. Baral was given notice of the proposed action and nature of the charges against him, but no provision

that the decision for removal would be made by an impartial agency official nor was he given an opportunity to present his own witnesses or confront adverse witnesses. And, providing him a hearing after termination without adequate justification clearly is not within the concept of due process. "A hearing for an employee who has already been discharged could hardly be a meaningful one because it is a proceeding after the fact." *Ricucci v. United States, supra*, at 1257 (Skelton, J., concurring).

In *Kennedy v. Sanchez, supra*, the three-judge court by memorandum opinion on October 30, 1972, held unconstitutional and enjoined the enforcement of 5 U.S.C. 7501 which authorized suspension or removal of government employees without a pretermination evidentiary hearing. Petitioner in this case was removed from government employment under the same regulations.

4. THE ENTIRE ADMINISTRATIVE ACTION IS CLOUDED BY EVIDENCE OF BAD FAITH AND PROCEDURAL FLAWS.

The record reveals sufficient evidence of bad faith on the part of the Respondent to persuade the Court to grant certiorari. For example, on May 6, 1963, Petitioner was urged by Mr. John R. Provan, Director of Management Services (FAA), to accept a transfer proposed by the agency to a position as Information Analyst. Petitioner had never held a job as information systems analyst prior to this time and he expressed misgivings in regard to the proposed transfer. Nevertheless, he accepted the new assignment in part on reliance of Mr. Provan's oral assurance that it would be on a trial basis. On August 8, 1963, after three months, the

petitioner requested a transfer back to budget work and was refused.

Specifications 4 and 5, a partial, yet significant basis of the government's decision, involved a major and abnormal restriction imposed by the FAA on the way in which the subject assignments could be carried out. Petitioner maintains that the restriction made it practically impossible to obtain substantially different results; and that, notwithstanding the claim to the contrary, the restriction was in fact without warrant.

In the Air Traffic assignment (Specification 4) Petitioner was instructed to confine his review of the reporting requirements to the office files. Though his supervisor was advised numerous times of the need to engage in the normal and essential consultation with the Air Traffic Service, the bar to such consultation was never lifted. Petitioner maintains that the limitation of the review to the office files precluded any firm conclusions on the soundness of various reporting systems because the files were not adequate for the purpose; that his supervisor was aware of this, or that it was called to his attention; and that under the prescribed circumstances a substantially different result could not have been obtained.

In the Flight Standards assignment (Specification 5), Petitioner was again instructed to restrict his review of the reporting to the office files. Here again he advised his supervisor many times of the need to engage in the normal and essential consultation with the Flight Standards Service. His supervisor made no response. The Specification concerns a matter of opinion in the exercise of judgment

and Petitioner maintains that under the prescribed circumstances a substantially different result could not have been obtained; that his conclusions on the project were correct, were supported by substantial evidence, and by expert testimony, and were clearly not evidence of inefficiency; and that the basis on which the Specification was sustained by the Appeals Examining Office was inconsistent with the letter of charges and was in fact a modification of the charge.

Another example of bad faith is the three-day suspension issue where the government contended before the Court of Claims that the "complete record . . . was available and reviewed by the Appeals Examining Office in accord with the regulations." This is contrary to the facts and a similar misrepresentation was previously made to the Board of Appeals and Review. If these misrepresentations were deliberate, bad faith would be involved. The FAA personnel involved in the instant removal proceeding were earlier involved in the suspension proceeding and therefore could be expected to be familiar with the documents involved. It was not difficult to ascertain whether the complete record of the suspension proceeding was in fact available and reviewed by the Appeals Examining Office in accord with the regulations, and the government has made an effort on at least five separate occasions to avoid an admission of error on this point. These circumstances suggest bad faith might be involved since the coincidences are surely more than inadvertent.

The situation is further clouded by the fact that Mr. John R. Provan was the deciding official on Petitioner's appeal of the suspension action. Because of his prior

involvement in the Petitioner's transfer to the information analyst position, and to avoid any possible appearance of bias, he was asked to step aside. Mr. Provan decided not to step aside, stating that he thought he could review the matter objectively. When Mr. Provan was again scheduled to be the deciding official on Petitioner's appeal within the agency on the removal action, he decided of his own volition to step aside. There is no discernible difference in the considerations which would lead to these diametrically opposed decisions, but the impact upon Petitioner was great. If Mr. Provan had made a decision, either at Petitioner's suggestion or of his own volition, to step aside as the deciding official on the three-day suspension the entire controversy, which after a protracted course is now before this Court, might have been avoided.

5. THE COURT OF CLAIMS ERRONEOUSLY GRANTED THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT.

In the Order granting the Government's Motion for Summary Judgment the Court of Claims states that "we consider that the sole issue before us now is that of substantial evidence." Other issues, related to due process and procedural error (and bad faith), were also raised, but the Court of Claims decided that none of them could be considered either because they were raised for the first time before it, or because they were "not stated here adequately, or at all, to constitute grounds on which the Court might decide." The Court did not specify which issues fell into each category. Petitioner submits that the Court was in error – that the issues were properly raised, and though they may have been stated imperfectly they were nevertheless adequately stated for the purpose of showing that

it would not be proper to allow the Government's motion for summary judgment and that the Court should have referred the case to a Commissioner for trial of issues of material fact, findings of fact, and recommendations as to conclusions of law. Where the assertions of a party raise triable issues of fact, summary judgment is precluded. *Huling v. U.S.*, 401 F.2d 998, 1002, 185 Ct. Cl. 407 (1968).

This general rule as interpreted in the above case by the Court of Claims is consistent with the general law applicable to the granting of summary judgment under the Federal Rules of Civil Procedure. See *Kirkpatrick v. Consolidated Underwriters*, 227 F.2d 228, quoting *Pierce v. Ford Motor Co.*, 190 F.2d 910, 915 (4th Cir.):

> " . . . it (motion for summary judgment) should be granted only where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law. See *Westinghouse Electric Corp. v. Bulldog Electric Products Co.*, 179 F.2d 139; *Wexler v. Maryland State Fair*, 164 F.2d 477. And this is true even where there is no dispute as to the evidentiary facts in the case but as to the conclusions to be drawn therefrom. *Paul E. Hawkinson Co. v. Dennis*, 166 F.2d 61, *Detsch & Co. v. American Products Co.*, 152 F.2d 473, *Furton v. City of Menasha*, 149 F.2d 945, *Shea v. Second National Bank*, 133 F.2d 17. As was said by Mr. Justice Jackson, speaking for the Supreme Court in *Sartor v. Arkansas Natural Gas Co.*, 321 U.S. 620, 'Rule 56 authorizes summary judgment only where the moving party is entitled to judgment

> as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.'"

Petitioner's fourth Question Presented outlines some substantial areas of controverted facts, ~~are~~ AND especially areas where there could be a dispute as to conclusions drawn from undisputed evidentiary facts. *Paul E. Hawkinson v. Dennis, supra; Detsch & Co. v. American Products Co., supra, Furton v. City of Menasha, supra; Shea v. Second National Bank, supra.*

Petitioner asserts that the Court of Claims erroneously held that there was substantial evidence in the record to support the conclusion of the Civil Service Commission that he was inefficient. If substantial evidence does exist, it shows that Petitioner was not inefficient and should not have been discharged. The Court of Claims in its December 13, 1972 Order specifically said that "we do not determine ourselves whether plaintiff was inefficient . . ."

In the instant case the Court of Claims, in granting summary judgment against a lay petitioner proceeding *pro se* without reference of the case to a Commissioner, and without allowing oral argument on the ground that it did "not think oral argument would be helpful", has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Rule 19(1)(b), Rules of the Supreme Court of the United States.

CONCLUSION

Petitioner asks that this Court grant his request for a Writ of Certiorari and reverse the judgment of the Court of Claims in granting the government's motion for summary judgment.

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CERTIFICATE OF SERVICE

I certify that copies of the above Petition for a Writ of Certiorari were forwarded to the Solicitor General of the United States this 9th day of August, 1973.

Whitworth Stokes

APPENDIX

STATUTES AND COURT ORDERS

5 U.S.C. 5596, the Back Pay Act, provides:

Back pay due to unjustified personnel action

(a) For the purpose of this section, "agency" means –

(1) an Executive agency;

(2) the Administrative Office of the United States Courts;

(3) the Library of Congress;

(4) the Government Printing Office; and

(5) the government of the District of Columbia.

(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employees –

(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and

(2) for all purposes, is deemed to have performed service for the agency during that period,

except that the employee may not be credited, under this section, leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of the leave authorized for the employee by law or regulation.

(c) The Civil Service Commission shall prescribe regulations to carry out this section. However, the regulations are not applicable to the Tennessee Valley Authority and its employees. Added Pub.L. 90-83, §1(34) (C), Sept. 11, 1967, 81 Stat. 201.

* * * * *

5 U.S.C. 7501, the Lloyd-LaFollette Act, provides:

Cause; procedure, exception

(a) An individual in the competitive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service.

(b) An individual in the competitive service whose removal or suspension without pay is sought is entitled to reasons in writing and to –

(1) notice of the action sought and of any charges preferred against him;

(2) a copy of the charges;

(3) a reasonable time for filing a written answer to the charges, with affidavits; and

(4) a written decision on the answer at the earliest practicable date.

Examination of witnesses, trial, or hearing is not required but may be provided in the discretion of the individual directing the removal or suspension without pay. Copies

of the charges, the notice of hearing, the answer, the reasons for and the order of removal or suspension without pay, and also the reasons for reduction in grade or pay, shall be made a part of the records of the employing agency, and, on request, shall be furnished to the individual affected and to the Civil Service Commission.

(c) This section applies to a preference eligible employee as defined by section 7511 of this title only if he so elects. This section does not apply to the suspension or removal of an employee under Section 7532 of this title. Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 527.

* * * * *

28 U.S.C. 1255 provides:

Court of Claims; certiorari; certified questions

Cases in the Court of Claims may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted on petition of the United States or the claimant;

(2) By certification of any question of law by the Court of Claims in any case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions on such question. June 25, 1948; c. 646, 62 Stat. 928.

* * * * *

IN THE UNITED STATES COURT OF CLAIMS
No. 847-71

DAVID H. BARAL	:
	:
v.	:
	:
THE UNITED STATES	:

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG and BENNETT, *Judges*.

ORDER

This case comes before the court on plaintiff's pro se petition, defendant's motion, filed March 13, 1972, for summary judgment and plaintiff's motion, filed October 4, 1972, for oral argument, having been considered, together with the oppositions thereto, without oral argument. Plaintiff, a tenured U.S. Government employee, was discharged for inefficiency and has exhausted his administrative remedies. We consider that the sole issue before us now is that of substantial evidence. Certain points relating to due process, and procedural error, are made in the petition, in plaintiff's brief, or in the administrative record; some must be disregarded as made for the first time here, and others, made during the administrative proceedings, are not stated here adequately, or at all, to constitute grounds on which the court might decide. We do not determine ourselves whether plaintiff was inefficient, but only whether the conclusion of the Civil Service Commission, that he was, has the support of substantial evidence in the record. A careful review of that record convinces

us that it does. Plaintiff has moved for oral argument and defendant opposes this. We deny this motion because we do not think oral argument would be helpful.

IT IS THEREFORE ORDERED that plaintiff's motion for oral argument is denied, that defendant's motion for summary judgment is granted and that plaintiff's petition is dismissed.

BY THE COURT

/s/ Wilson Cowen
Chief Judge

Dec. 13, 1972

* * * * * * *

IN THE UNITED STATES COURT OF CLAIMS

358-69	DONALD S. WEIR, JR.	)	
213-70	ROBERT SIMMONS CONSTRUCTION CO., INC.	)	
444-70	ROLAND DORL	)	v. THE UNITED STATES
528-71	WILLIAM J. BENDER	)	
847-71	DAVID H. BARAL	)	

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG and BENNETT, *Judges*

ORDER

These cases come before the court on motions for reconsideration, rehearing, new trial, to strike affidavit and for further relief under Rules 151 and 152 of the rules of this court and, on consideration thereof,

IT IS ORDERED this 11th day of May, 1973, that said motions be and the same are denied as follows:

358-69 Donald S. Weir, Jr. Plaintiff's motion for reconsideration and rehearing.

213-70 Robert Simmons Construction Co., Inc. Plaintiff's motion for rehearing and/or for new trial. Defendant's motion to strike affidavit of Robert F. Simmons submitted in support of plaintiff's motion for rehearing and/or new trial is denied as moot.

444-70 Roland Dorl. Plaintiff's motion for reconsideration of the court's decision of February 16, 1973.

528-71 William J. Bender. Plaintiff's motion for rehearing of plaintiff's and defendant's cross-motions for summary judgment pursuant to Rule 151.

847-71 David H. Baral. Plaintiff's motion for reconsideration.

BY THE COURT

/s/ Wilson Cowen
Chief Judge

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No. 73-267

FILED
OCT 17 1973
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In the Supreme Court of the United States

OCTOBER TERM, 1973

DAVID H. BARAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-267

DAVID H. BARAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In January 1966, petitioner was removed from his employment in the competitive service with the Federal Aviation Administration for inefficiency, under procedures authorized by the Lloyd-LaFollette Act, 5 U.S.C. 7501, and the governing regulations of the Administration and the Civil Service Commission. Under these procedures, petitioner had an opportunity to respond to the agency's charges orally and in writing prior to removal, and he responded in writing, challenging the charge of inefficiency but raising no procedural objections to the proceedings against him. Following petitioner's removal, he appealed within the Administration, where he was granted a trial-type, evidentiary hearing pursuant to 5 C.F.R. Part 771, and after that hearing his removal was sustained by the Associate Administrator. Thereafter petitioner appealed to the Commission for *de novo* consideration under 5 C.F.R. Part 772. After

another full evidentiary hearing, the removal was upheld by the Appeals Examining Office in October 1968, and then by the Board of Appeals and Review in April 1969.

In November 1971, petitioner instituted the present action in the Court of Claims seeking back pay for his allegedly wrongful removal. Petitioner challenged the factual basis for the removal and contended, for the first time, that his removal prior to the holding of a full evidentiary hearing constituted a denial of procedural due process.

The Court of Claims dismissed the petition, holding that the administrative action was supported by substantial evidence in the record and that the procedural errors relied upon by petitioner had not been timely or adequately raised (Pet. App. 4-5).

1. Petitioner's principal contention is that the Lloyd-LaFollette Act and the governing regulations violate the Due Process Clause of the Fifth Amendment in not requiring a trial-type, evidentiary hearing prior to removal of a non-probationary federal employee in the competitive service. This question is now before this Court in *Arnett* v. *Kennedy,* No. 72-1118, probable jurisdiction noted April 2, 1973. However, we do not believe this petition should be held pending disposition of *Kennedy.* In *Kennedy,* the discharged employee timely raised his procedural claim prior to removal, and the validity of that removal was never tested in a full evidentiary hearing. Here, by contrast, petitioner did not raise a due process challenge to the governing removal procedures at the administrative level, and the subsequent hearings, especially on *de novo* consideration by the Commission, removed any suggestion of unfair-

ness or inaccuracy that might otherwise have attached to the original administrative determination.

Thus, even if this Court should rule against the government in *Kennedy*, it would be inappropriate to require reinstitution of this removal proceeding, more than seven years after removal, on the basis of newly raised contentions relating to alleged procedural defects which were waived at the outset and, in any event, have been substantially cured.

2. Petitioner's other contentions relate principally to the factual basis for his removal. As the court below correctly held, there was substantial evidence to support the independent findings by the Administration and the Commission that petitioner had been inefficient; this evidentiary question warrants no further review.[1]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.

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[1] Petitioner's further contention that the initial decision is invalid because rendered by the official who also proposed his removal is without merit. *Studemeyer* v. *Macy*, 321 F. 2d 386 (C.A.D.C.), certiorari denied, 375 U.S. 934. It should be added that, unlike the related contention made in *Kennedy*, petitioner does not make a specific charge of bias against the initial decision-maker, resting instead only upon the view that the official's role as initiator of the removal in itself disqualifies him from deciding, in the first instance, the merits of the removal action.

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Supreme Court of the United States

OCTOBER TERM, 1973

DAVID H. BARAL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To
The United States Court of Claims

PETITIONER'S REPLY TO THE RESPONSE

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PETITIONER'S REPLY TO THE RESPONSE

Petitioner submits this reply brief to the memorandum for the United States in opposition to the petition for a writ of certiorari pursuant to Rule 24 of the Supreme Court Rules.

Petitioner respectfully submits that the memorandum for the United States is misleading or inaccurate in several respects, and that it raises certain arguments not previously raised.

1. Petitioner's written response to the agency's charges raised procedural objections to the proceedings against him. Respondent's memorandum contends that it did not, and incorrectly asserts that petitioner had no procedural objections until after the administrative proceedings were completed. (R. Memo 1, 2) The fact is that petitioner raised a procedural objection in his written response to the charges, and then a second one a short time later orally – both were raised prior to removal. Petitioner's first objection, in the written response, was to the use of procedures under the Lloyd-La Follette Act, 5 U.S.C. 7501. It was his position that no adverse action was warranted under the circumstances, but that should one nevertheless be initiated the procedures under the Performance Rating Act, 5 U.S.C. 4304,[a] would be more appropriate and should be followed. The latter Act accords the employee greater procedural protection in that it requires that an employee whose work is not satisfactory be given a 90-day advance warning that his work will be rated unsatisfactory, and a reasonable opportunity to demonstrate satisfactory performance. It should be noted that petitioner was never given such a warning, that he was never given an unsatisfactory performance rating, and that the periodic performance rating which was due early in September 1965, nearly three months prior to issuance of the letter of charges, was withheld on grounds which did not comply with the pertinent agency regulations. Under circumstances, such as here, where action may be taken under either statute, use of the procedures under the Lloyd-La Follette Act with its narrower procedural protection for the employee, when not warranted, is in effect

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[a] See page A.1 for text of the Performance Rating Act.

a circumvention of the employee's greater procedural protection under the Performance Rating Act. Petitioner objected on these grounds to the use of the procedures under the statute with the narrower procedural protection for the employee.

Following denial of his first objection petitioner raised the second procedural issue; he objected to the adverse action being taken prior to a hearing, presentation of witnesses and documentary evidence, confrontation and cross-examination of witnesses, and a decision by a neutral body – thus raising the due process issue. The objection was made orally on, or shortly after, January 21, 1966 when petitioner was informed that his written response to the charges was unavailing. It too was denied; the denial was oral. (Pet. 4)

It should be noted, in addition, that the fact that the objection was raised at the time stated has heretofore not been controverted.

The above facts negate respondent's contention that "petitioner did not raise a due process challenge to the governing removal procedures at the administrative level", and negate also respondent's attempt to distinguish on this ground the facts in this case from those in *Arnett v. Kennedy*, No. 72-1118, probable jurisdiction noted April 2, 1973. (R. Memo. 2)

2. Respondent's memorandum gives a misleading impression with regard to the hearing at the Civil Service Commission. It was not a *de novo* hearing in the true sense of the term. (R. Memo. 2, 3) The record shows that at the inception of the hearing petitioner moved for a truly *de novo* hearing with the respondent required to put on his case first and to bear the initial burden of persuasion. Petitioner's motion was denied and he excepted.

Petitioner was required, we believe erroneously, to put his case on first, and had the initial burden of persuasion.

3. Respondent disposes of petitioner's "other contentions" by alleging that these relate principally to the factual basis for his removal, and that further review of this evidentiary question was not warranted. (R. Memo. 3) The reference to "other contentions" is to the points raised in Arguments 4 and 5 of the petition. Argument 4 deals with whether "the entire administrative action is clouded by evidence of bad faith and procedural flaws", and the points discussed give five examples in support of the argument. (Pet. 9-12) Argument 5 deals with whether "the Court of Claims erroneously granted the government's motion for summary judgment". (Pet. 12-14) As can be seen, neither argument relates principally to the factual basis for petitioner's removal, and respondent's argument to this effect is inconsistent with the facts.

4. Also inconsistent with the facts are the suggestions in respondent's memorandum that petitioner at any time knowingly waived any of his rights, or that the procedural defects have been substantially cured.

For the foregoing reasons, and those previously advanced in the petition, it is respectfully submitted that the petition for a writ of certiorari should be allowed.

WHITFORD STOKES,
Attorney for Petitioner

APPENDIX

§4304. Ratings for performance

(a) Each performance-rating plan shall provide for ratings representing at least –

(1) satisfactory performance;

(2) unsatisfactory performance; and

(3) outstanding performance.

(b) An employee may be rated unsatisfactory only after a 90-day advance warning and after a reasonable opportunity to demonstrate satisfactory performance. A performance rating of unsatisfactory is a basis for removal from the position in which the performance was unsatisfactory.

(c) A performance rating of outstanding may be given only when all aspects of performance not only exceed normal requirements but are outstanding and deserve special commendation. Pub.L. 89-554, Sept 6, 1966, 80 Stat. 440.